New Article 32, Preliminary Hearing Procedures for Commanders

(On or After 26 December 2014)

References

1) Art. 32, UCMJ (2014)
2) ALNAV 086/14
3) MCO P5800.16A, LEGADMINMAN
4) Naval Justice School’s Preliminary Hearing Officer’s class and guide

Old vs. New Article 32

OLD ARTICLE 32

- Wide open scope
- "Reasonable Grounds"
- Discovery opportunity for the defense
- Military victims could be ordered to testify
- "Investigating Officer" – active participant who owns the investigation and could call witnesses
  - Subpoena power

NEW ARTICLE 32

- Narrow scope
- "Probable Cause"
- Specifically not a discovery tool
- All victims may decline to testify
- "Preliminary Hearing Officer" – limited role to hear the evidence to determine if there is PC
  - No subpoena power

Old vs. New Article 32

OLD ARTICLE 32

- "Alternatives to testimony and evidence;" unwieldy witness availability analysis.
- Must produce "reasonably available" witnesses

- Victim's rights not mentioned
- IO was any commissioned officer

NEW ARTICLE 32

- Any "reliable" evidence can be considered, including unsworn statements
- "relevant, not cumulative, and necessary." Witness CO determines availability
- Victim's right to notice and attendance
- PHO is a JA and senior to counsel (when practicable)

Decision Points

- Convening an Article 32 hearing
- Appointing a hearing officer
- Waiver by the accused
- Protective Orders
- Access by spectators
- Witness requests
- Handling the report

Convening an Article 32 Hearing

- Before referral to a general court-martial, the UCMJ requires an Article 32 "preliminary hearing."

- An Article 32 hearing may be convened to examine charges more appropriate for a GCM due to a SPCM's jurisdictional limits:

  (1) reduction to E-1 (2) 12 months confinement (3) 12 months of 2/3 forfeitures (4) Bad Conduct Discharge

- Certain offenses, if warranted, may only be referred to a GCM :
  - Rape or sexual assault (Art. 120)
  - Rape or sexual assault of a child (Art. 120b)
  - Forcible sodomy (Art. 125)
  - Attempts to commit any of the above (Art. 80)

Purpose of the Hearing

- This is a preliminary hearing, not an investigation.

- The hearing is limited to the following:
  - Determining whether there is PC to believe an offense has been committed and the accused committed it
  - Determining whether there is jurisdiction over the offense and the accused
  - Considering the form of charges
  - Recommending disposition

Appointing a PHO

- PHO Qualifications
  - Must be an impartial judge advocate, certified under Article 27(b), equal or senior to the military counsel, whenever practicable
    - Can use non-JA or be junior to the TC/DC by exception
    - **USMC – PHO must be a major, or meet experience quals, and SEXUAL ASSAULT cases require a JA PHO - ¶ 1106 MCO P5800.16A**
  - Must be impartial, cannot be an accuser, cannot be close personal friend of accuser
  - Cannot previously have had role in inquiring into offense being investigated

Appointing Order

- The CA may delegate certain authority to the PHO in the appointment order.
  - For example PHO may only grant a continuance under RCM 707 or grant excludable delay if CA has given PHO that authority.

- The CA may also appoint a court reporter, interpreter or legal advisor when the PHO is not a JA.

- The CA must personally appoint the PHO.

Waiver by Accused

- The accused may waive the preliminary hearing. No hearing is then required.

- However, the CA may direct that a preliminary hearing be conducted notwithstanding the waiver.

Protective Orders

- The CA may issue a protective order covering, privileged, classified or other government information, if this information is authorized to be provided to the accused.

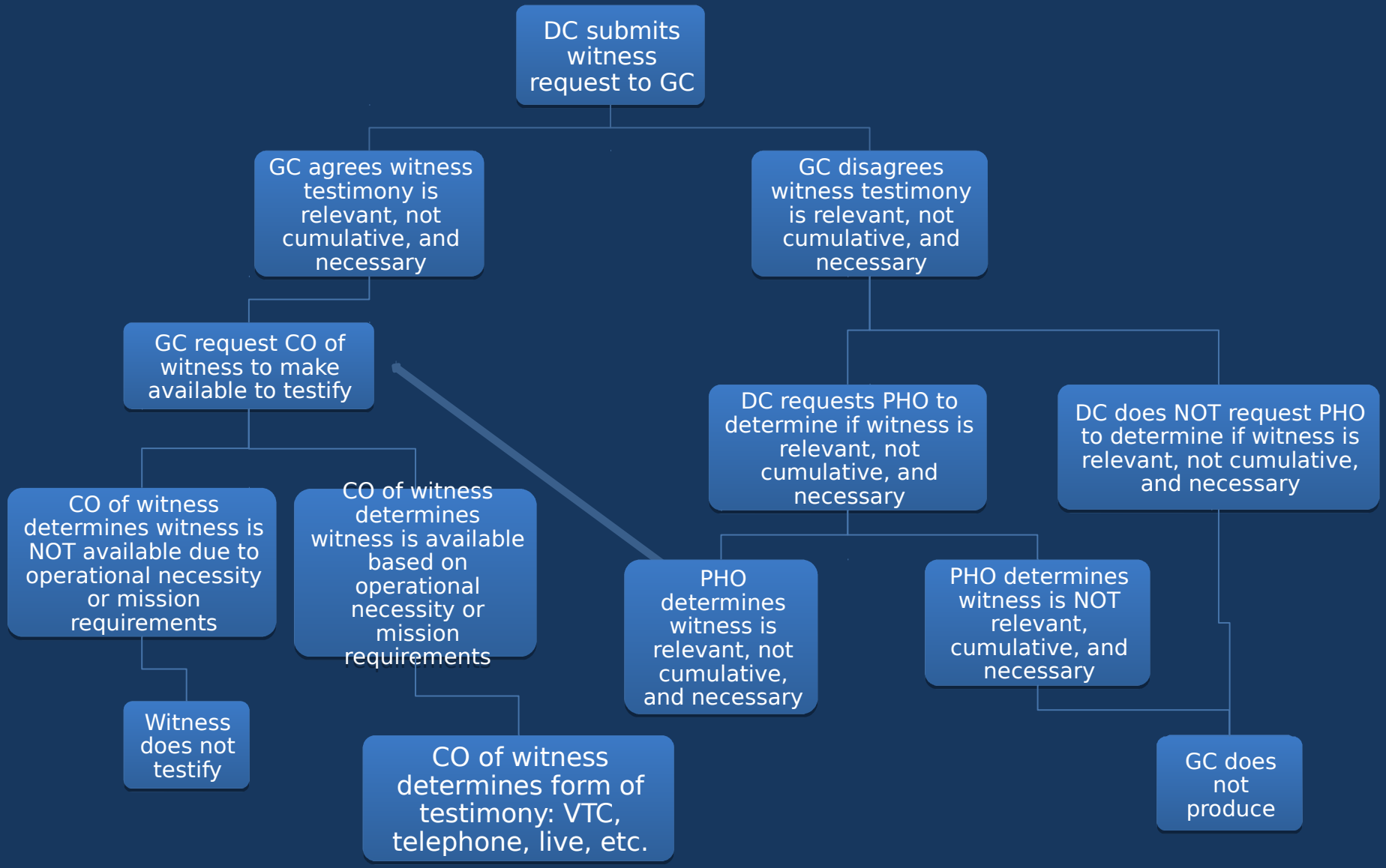
- The protective order may include prohibiting the accused from disclosing information except as authorized by the CA.

- Prior to issuing a protective order, you should consult with your SJA.

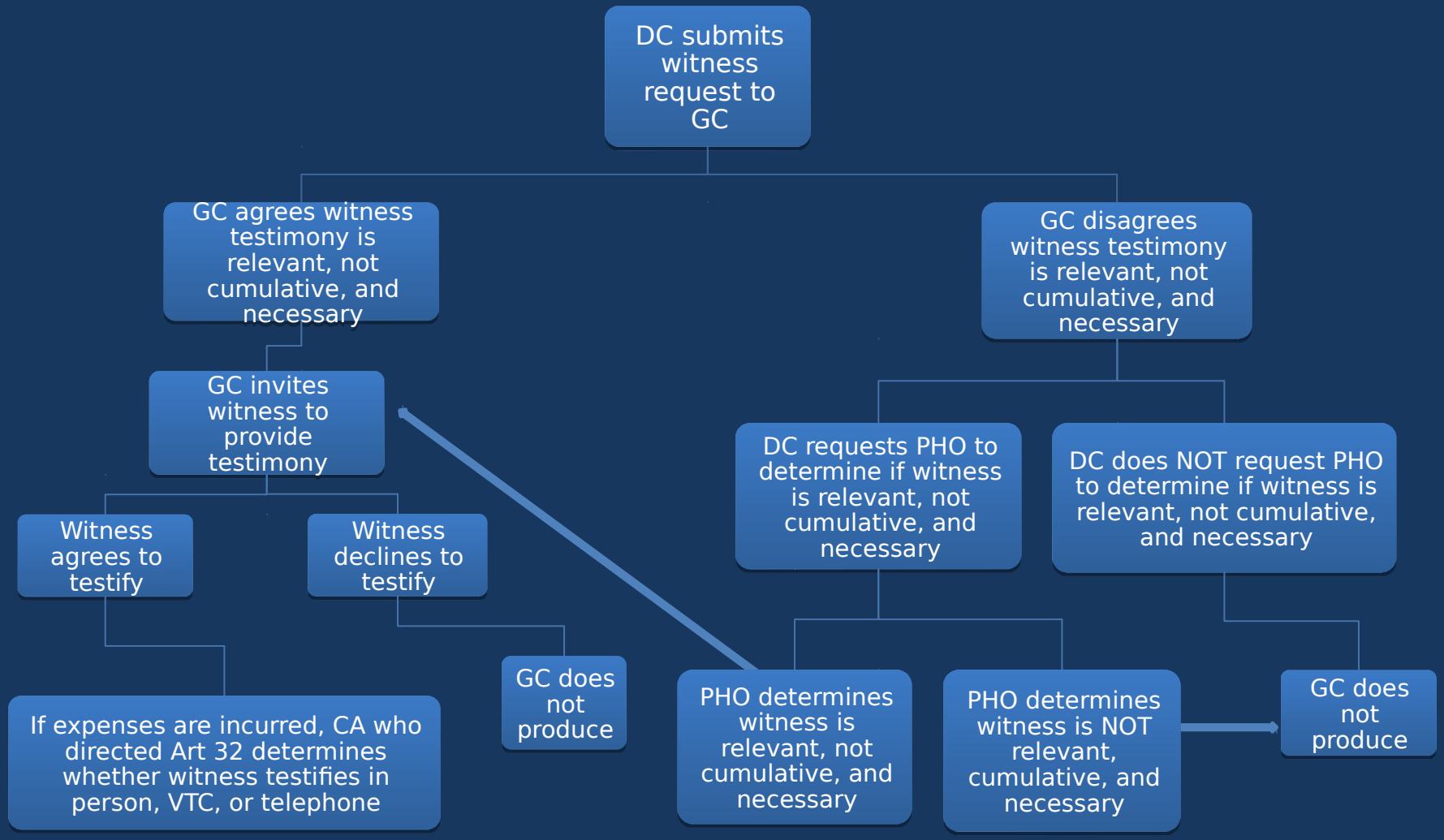
Access by Spectators

- The CA or the PHO may close all or part of the preliminary hearing from spectators.
- Preliminary hearings are public proceedings and should remain open to the public whenever possible.
- To restrict access, the CA or PHO must conclude that no lesser methods can be used to protect the overriding interest in the case, such as victim privacy or protecting classified information.
- The CA or PHO must make specific findings of fact in writing and include them in the report.
- Prior to closing a hearing, you should consult with your SJA.

Military Witness Request


DC submits witness request to GC
GC agrees witness testimony is relevant, not cumulative, and necessary
GC disagrees witness testimony is relevant, not cumulative, and necessary
GC request CO of witness to make available to testify
DC requests PHO to determine if witness is relevant, not cumulative, and necessary
DC does NOT request PHO to determine if witness is relevant, not cumulative, and necessary
CO of witness determines witness is NOT available due to operational necessity or mission requirements
CO of witness determines witness is available based on operational necessity or mission requirements
PHO determines witness is relevant, not cumulative, and necessary
PHO determines witness is NOT relevant, cumulative, and necessary
Witness does not testify
CO of witness determines form of testimony: VTC, telephone, live, etc.
GC does not produce

Civilian Witness Request


DC submits witness request to GC
GC agrees witness testimony is relevant, not cumulative, and necessary
GC disagrees witness testimony is relevant, not cumulative, and necessary
GC invites witness to provide testimony
DC requests PHO to determine if witness is relevant, not cumulative, and necessary
DC does NOT request PHO to determine if witness is relevant, not cumulative, and necessary
Witness agrees to testify
Witness declines to testify
If expenses are incurred, CA who directed Art 32 determines whether witness testifies in person, VTC, or telephone
GC does not produce
PHO determines witness is relevant, not cumulative, and necessary
PHO determines witness is NOT relevant, cumulative, and necessary
GC does not produce

Factors for Witness Requests

- For Military Witnesses, the witness's CO makes a determination on availability using the following factors:
  1) costs of producing the witness;
  2) timing of the request;
  3) recommendation of the PHO;
  4) potential delay; and
  5) likelihood of significant interference with operational deployment, mission accomplishment, or essential training
- Balancing test: The more important the testimony of the witness, the greater the difficulty, expense, delay, or effect on military operations must be to deny production.

- For Civilian Witnesses, the CA makes the determination using many of the factors above, plus, the willingness of the witness to testify in person; and, for child witnesses, the traumatic effect of providing in-person testimony.

PHO’s Report

- The PHO shall make a “timely” written report to the CA.
- If the accused is ordered into arrest or confinement, the charges and the report should be forwarded to the GCMCA within 8 days (when practicable).
- After receiving the report from the PHO, a copy is given to each accused.
- Any objection to the report shall be made to the CA via the PHO, within 5 days of the accused receiving the report.
- The CA may refer charge(s) or take other action within the 5-day period.